



July 19, 2000

Ms. Julie Joe
Assistant Attorney General
Acting Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2000-2712

Dear Ms. Joe:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests were assigned ID# 137190 and 137474.

The Office of the Attorney General (the "OAG") received two requests for specified documents submitted to the OAG by Michael Tigar between April 1, 2000, and May 10, 2000, relating to attorneys' fees in *State of Texas v. American Tobacco Co., et al.*, Civil Action No. 5:96-CV-91 in the United States District Court, Eastern District of Texas. The responsive information consists of a memo with 54 footnotes and 54 attachments. The footnotes refer to documents quoted in the memo or used to support statements in the memo, and the attachments consist of the source documents themselves. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Section 552.103 of the Government Code provides in relevant part:

(a) Information is excepted from the requirements of Section 552.021 if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date

¹Your brief explains that your claimed exception under section 552.101 is contingent on the outcome of a court hearing on a "Motion for Leave to File Documents Under Seal" which has been filed in the pending litigation. Because the documents are not currently under seal, we will not address your section 552.101 claim.

that the requestor applies to the officer for public information for access to or duplication of the information.

The OAG has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The OAG must meet both prongs of this test for information to be excepted under 552.103(a).

You inform us that litigation is pending; in fact, four proceedings are ongoing: *In re State of Texas*, Cause No. 5-00-CV-118, in the United States District Court for the Eastern District of Texas, Texarkana Division; *The State of Texas vs. The American Tobacco Company, et al.*, No. 5-96-CV-0091, in the United States District Court for the Eastern District of Texas, Texarkana Division; *In re Private Counsel Fee Agreement*, No. 5-98-CV-270, in the United States District Court for the Eastern District of Texas, Texarkana Division; and *In re Senator Troy Fraser*, No. 5-98-CV-0045, in the United States District Court for the Eastern District of Texas, Texarkana Division. You also inform us that additional litigation is anticipated as a result of ongoing investigations related to the current litigation. The OAG has met the first prong of the test for the applicability of section 552.103(a). The OAG has also established the relatedness of the responsive documents to both the pending and anticipated litigation.

However, some types of information are not excepted from required disclosure by section 552.103. For example, information specifically made public by section 552.022(a) of the Government Code is not excepted from disclosure by section 552.103(a). Section 552.022(a) sets forth the categories of public information and provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made *of, for, or by* a governmental body, except as provided by Section 552.108;

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

(17) information that is also contained in a public court record[.][Emphasis added.]

Section 552.103 is a discretionary exception and is not "other law" for the purposes of section 552.022(a).² We include section 552.022(a)(1) above in order to address the argument that the submitted information constitutes a "report" for purposes of that provision. We note that, while the memo was delivered to the OAG with a cover letter and cover page referring to the memo as a "report," a report required to be disclosed under section 552.022(a)(1) must be made "of, for, or by a governmental body." We have no basis to conclude that the memo was made "of, for, or by" anyone other than the Tigar Law Firm and its current clients. Therefore, the memo is not a "report" for the purposes of section 552.022(a)(1), and may be withheld from disclosure pursuant to section 552.103.

Most of the attachments to the memo may also be withheld under section 552.103; however, among the attachments, we find two items, attachments 36 and 46, which may be required to be released under section 552.022(a)(17). Any item which is "also contained in a public court record" must be released. In addition, attachment 39 appears to be subject to release under section 552.022(a)(3) as a final contract "relating to the receipt or expenditure of public or other funds by a governmental body." The OAG must release attachment 39 and is required to release attachments "also contained in a public court record," if any. The OAG may withhold the remaining responsive information.³

Because we find sections 552.103 and 552.022 dispositive, we will not address your other raised exceptions. This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer's privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, including sections 552.103, 552.107 and 552.111, therefore, do not constitute "other law" that makes information confidential. However, section 552.101 is a mandatory exception. It excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." A judicial decision placing documents under seal, for example, does constitute "other law" making information confidential, so that section 552.022(a) will not be applicable.

³ We note that, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all opposing parties in both the pending and anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the pending and anticipated litigation have concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Should you receive another request for this information, and the status of the litigation has changed, you should request another decision from this office.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Patricia Michels Anderson
Assistant Attorney General
Open Records Division

PMA/pr

Ref: ID# 137190

Encl. Submitted documents

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